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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA

v.

CHRISTOPHER CANTWELL

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1:20-cr-6-01-PB

September 10, 2020

2:30 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government:

John S. Davis, AUSA

Anna Z. Krasinski, AUSA

United States Attorney's Office

For the Defendant:

Eric Wolpin, Esq.

Jeffrey S. Levin, Esq.

Federal Defender's Office

Court Reporter:

Liza W. Dubois, RMR, CRR

Official Court Reporter

1 P R O C E E D I N G S

2 THE COURT: Hi, this is Judge Barbadoro. I'd ask my  
3 case manager, do I have everybody on who needs to be on?

4 THE CLERK: You do, your Honor --

5 MR. LEVIN: Jeff Levin and Eric Wolpin are on.

6 THE CLERK: John Davis and Anna Krasinski are on as  
7 well, your Honor. Everyone's here.

8 THE COURT: And do I have a court reporter?

9 THE CLERK: You do, your Honor.

10 THE COURT: All right. Great.

11 So I understand that the government wants to conduct  
12 the deposition of a government witness that would require  
13 removing Mr. Cantwell from the jail and the parties traveling  
14 out of state to take the deposition. Do I have that right?

15 MS. KRASINSKI: Yes, your Honor.

16 THE COURT: All right. I guess the first question I  
17 have is I met with you on Tuesday, if I'm remembering  
18 correctly. Why -- why didn't you raise this with me then?

19 MS. KRASINSKI: Candidly, your Honor, I was hoping  
20 to, but the call ended pretty abruptly because we had the  
21 informant call scheduled after. And so it -- we just sort of  
22 ran out of time and I was still trying to work out whether it  
23 would even be logistically possible.

24 THE COURT: Okay. Well, I've got to tell you, I'm  
25 quite disappointed. This has been extremely disruptive. I'm

1 currently at a place where I have very limited Internet and  
2 telephone access. I fortunately just happened to have a chance  
3 to log on and see that the motion had been filed. I have been,  
4 at least in my mind and in my experience, devoting an  
5 extraordinary amount of time in meeting with counsel for both  
6 sides as the case trial date nears in an effort to try to help  
7 counsel prepare for trial because I recognize that this is a  
8 somewhat unusual case.

9 But I really do expect that counsel for both sides  
10 will work as hard as I am to try to make this process work and  
11 I really would have expected to have heard from you during the  
12 regular call. And I -- this is quite disruptive for me and I'm  
13 not happy about it.

14 So you -- I've now expressed my unhappiness. Now  
15 let's turn to the merits.

16 I -- I can't really understand from your motion  
17 where -- where is this person who you want to depose?

18 MS. KRASINSKI: The -- the witness is in a suburb of  
19 St. Louis, your Honor.

20 THE COURT: All right. So you're going to say my  
21 whole trial team, both sides, are going to get on a plane,  
22 Cantwell is going to get on a plane with an FBI agent, you're  
23 going to fly to St. Louis where there's a higher positivity  
24 rate than we have here, conduct a deposition, and then come  
25 back? Is that what you're telling me?

1 MS. KRASINSKI: That's how Rule 15 reads, your  
2 Honor. If the --

3 THE COURT: Well, why are -- why are we not -- why  
4 are we not bringing her here? I don't understand this. You've  
5 told me she's pregnant. What else is there about it that tells  
6 me this is a -- such an extraordinary problem that I have to  
7 endanger the entire trial team, perhaps disrupt the entire  
8 trial schedule, to accommodate this one interest? Does she  
9 have some kind of preexisting condition that -- other than the  
10 fact that she's pregnant? I don't know how pregnant she is.

11 Tell me in more detail why you want this  
12 extraordinary form of relief that I have not ever had anybody  
13 ask me in the 28 years that I've been on the court.

14 MS. KRASINSKI: Your Honor, she, I believe, is --  
15 she's in the first trimester. We were not aware of the  
16 pregnancy until very recently. She has informed us that she  
17 has a history of miscarriages. At this point the data is  
18 unclear as to whether or not a history of miscarriages would  
19 impact what the CDC says is -- a woman who is pregnant is at a  
20 higher risk of negative pregnancy outcomes, including preterm  
21 birth.

22 So her doctor has advised her not to travel. She  
23 informed us of that and informed us of the history of  
24 miscarriages. But, again, there's insufficient data with  
25 COVID-19 and pregnancy at this point to know whether or not

1 that history of miscarriages would place her at greater risk of  
2 a negative pregnancy outcome if she were to contract COVID-19.

3 And --

4 THE COURT: I --

5 MS. KRASINSKI: -- Attorney Davis -- sorry?

6 THE COURT: I -- I'm sorry. But are you aware of  
7 data that suggests that -- that the risk of -- of -- being  
8 infected with COVID-19 does have an effect on negative outcomes  
9 with pregnant women that's different from ordinary risks that  
10 people face if they're infected by COVID-19?

11 MS. KRASINSKI: The CDC --

12 THE COURT: I haven't seen any of that data.

13 MS. KRASINSKI: The CDC has updated its guidelines  
14 to say that from what they can tell right now, there may --  
15 they don't say definitively, but there may be an increased risk  
16 of severe complications where a pregnant woman contracts  
17 COVID-19 and that there may be an increased risk of negative  
18 pregnancy outcomes, including preterm birth.

19 So the CDC guidelines say nay.

20 THE COURT: Okay. I guess my next question is why  
21 shouldn't I order you guys to go out there tomorrow, get on a  
22 plane, get this thing done, so that everybody can  
23 self-quarantine and take negative tests in a way that satisfies  
24 me that I'm conducting a safe trial and not delaying the trial?  
25 Why -- why do I need to wait till the 16th, just because that's

1 when people are available?

2 MS. KRASINSKI: I -- I think if doing it tomorrow  
3 would give people sufficient time for the Court to feel safe  
4 for everyone to appear on the 15th, I think that we could make  
5 that work. I was trying to see if there was a day after jury  
6 selection --

7 THE COURT: Well, we can send one of you out  
8 there --

9 MS. KRASINSKI: Yes.

10 THE COURT: -- from each -- one from the defense  
11 team, one from the government team, and the other defense  
12 lawyer and government lawyer can conduct the jury selection.  
13 And then the ones that have gone out there can quarantine and  
14 we should be -- well, I guess I still have to have Cantwell  
15 there, don't I, at the jury selection?

16 I mean, this is -- this is so frustrating for me to  
17 be presented with this on such short notice.

18 MS. KRASINSKI: I understand, your Honor. I -- I  
19 think Attorney Davis and I were trying to come up with any  
20 possible way to basically not ask for a continuance to May of  
21 next year and I -- I really do apologize for the way that  
22 this -- that I -- you know, I raised this with the Court and  
23 that I wasn't able to raise it on Tuesday.

24 THE COURT: All right. I -- it wasn't clear to me  
25 what the defense's position is on your proposal. I --

1           MR. LEVIN: We filed an objection, your Honor. I  
2 don't know if the Court has seen it, but we --

3           THE COURT: I -- no, I have not seen it.

4           MR. LEVIN: Oh, okay.

5           THE COURT: I have not seen it.

6           MR. LEVIN: Well, we filed a detailed objection. We  
7 don't believe that she's unavailable, which I think the  
8 government has the burden of showing she's unavailable, and  
9 also her testimony isn't material. We -- you know, we object  
10 to it.

11           And, also, the rule does require the defendant to be  
12 present at the deposition as well, so he'd have to be moved  
13 there tomorrow.

14           THE COURT: Right, that's what I -- I understand.  
15 That's what I'm -- that much I do understand from reading the  
16 government's motion. I did not know of your objection.

17           MR. LEVIN: We cited some cases as well that  
18 indicate that motions such as this made on the eve of trial,  
19 there's no abuse of discretion in refusing to grant them.

20           THE COURT: Yeah. Well, I know, but I -- I'm not  
21 into game-playing on either side to benefit or hurt either  
22 side. I try to get the right thing done if there's a way to do  
23 it. So I'm not going to just deny it out of spite. I -- I  
24 want to try to find a way for both sides to have a fair and  
25 safe trial and that's why I was talking to you multiple times

1 before -- in the weeks prior to the trial to try to flush out  
2 any of the issues like this that the parties, if they were  
3 doing their job, should be able to foresee, raise with the  
4 Court, and we can work it out in advance. And that's why I'm  
5 expressing the frustration that I'm expressing.

6 So I understand that you are objecting. Your view  
7 is her testimony is not material. Your view is that she's not  
8 unavailable. Is that essentially what the bottom line is on  
9 your -- and that I have discretion to deny because it's close  
10 to the time of trial.

11 MR. LEVIN: Right. And we -- we also -- we're not  
12 available to fly halfway across the country for a deposition.  
13 We have other cases and we're busy getting ready for -- to try  
14 this one.

15 THE COURT: Yeah. I understand. But what -- I  
16 mean, we'll have to -- you'll have to be available when I  
17 require you to be available. That's just the way things work.

18 Okay. Tell me, Ms. Krasinski, what is this witness  
19 supposed to testify to?

20 MS. KRASINSKI: So her testimony is relevant to the  
21 cyberstalking count. She will testify basically the impact of  
22 Mr. Cantwell posting pictures of her on the Radical Agenda  
23 Telegram, the public Telegram group, as well as Cantwell  
24 calling CPS to try to break up her family.

25 Count Four, the cyberstalking statute, allows -- a



1 person can violate that statute by acting with the specific  
2 intent to harass a person and engage in a course of conduct  
3 that causes or would reasonably be expected to cause distress  
4 to that person's spouse. And so her testimony is relevant to  
5 establishing whether or not his course of conduct, which  
6 included more than just the communications between Cantwell and  
7 Cheddar, Cheddar Mane, it -- you know, it included this call to  
8 Child Protective Services, it included posting pictures of her  
9 and her children in her home to this -- to this broader group,  
10 posting her address information under that, everything but the  
11 street number -- but the number of her house; her street, her  
12 town, her state.

13 And so her testimony is relevant to that count, to  
14 an essential element of that count.

15 THE COURT: Can I -- again, unfortunately, because  
16 I -- I think not unreasonably -- expected that the parties  
17 would bring issues that needed to be brought to my attention to  
18 my attention at the conference call I scheduled for that  
19 purpose, I do not have access to the materials that I would  
20 ordinarily have in front of me. So you need to answer this  
21 question for me.

22 I do not recall whether the cyberstalking count as  
23 charged identifies her as a person who -- whose reaction is an  
24 element of the -- of the charged offense. Can you refresh my  
25 memory on that?

1 MS. KRASINSKI: It does, your Honor. And I can read  
2 you the -- that portion of Count Four. Let me just turn to it  
3 right now.

4 So this is on page 3 of docket 33, the superseding  
5 indictment, of between in or about June 15th and June 17th,  
6 2019, within the District of New Hampshire and elsewhere, the  
7 defendant, Christopher C. Cantwell, with the intent to harass  
8 and intimidate Victim 1, did use facilities of interstate and  
9 foreign commerce, including electronic communication services  
10 and telephone facilities, to engage in a course of conduct that  
11 placed Victim 1 in reasonable fear of serious bodily injury to  
12 Victim 1's spouse and that caused, attempted to cause, and  
13 would reasonably be expected to cause substantial emotional  
14 distress to Victim 1 and Victim 1's spouse.

15 It then goes on to describe some of the course of  
16 conduct.

17 THE COURT: All right. So you did identify the  
18 spouse in the indictment as one of the people who the course of  
19 conduct is affecting, right? So that's -- that's why you think  
20 it's important to have her testify.

21 MS. KRASINSKI: Yes, your Honor.

22 THE COURT: All right. What's the defense say to  
23 that?

24 MR. WOLPIN: That --

25 MR. LEVIN: I'm sorry. Was someone trying to speak?

1 MR. WOLPIN: Yeah. Do you mind, Jeff?

2 MR. LEVIN: Okay. Go ahead.

3 MR. WOLPIN: Okay.

4 Your Honor, the -- I think it's important to  
5 understand some of the factual background of this.

6 The communication occurred in June of last year.  
7 Those communications were online, as the Court is aware,  
8 between Cheddar Mane and the defendant. Ms. Lambert had no  
9 knowledge of that at the time. She doesn't learn about this  
10 until four months later when the FBI shows up at her door and  
11 sort of points this out to her as being in existence. So for  
12 that entire four-month period, there's no communication or  
13 interaction. She has no knowledge of this.

14 When the FBI interviews her in October, she says she  
15 doesn't know who Cheddar Mane is; she doesn't know who Chris  
16 Cantwell is; she doesn't know who Vic Mackey is; she does not  
17 know about her husband's online activities or the extent to  
18 which he has these views and had not learned about this until  
19 the point at which the FBI brought it to her attention.

20 So to suggest that somehow four months later when  
21 the FBI comes knocking at the door saying your family's in  
22 danger that she has a reaction, I don't see that as relevant.  
23 That -- she was never actually part of this. She didn't know  
24 about it at the time. And so to suddenly say that her reaction  
25 four months later informs the jury of things that are relevant

1 I just think isn't the case. That is -- again, that's how her  
2 involvement comes about.

3 It would be something different if she had told the  
4 FBI that she was actually involved in this or knew about it or  
5 was made aware of it or her husband had reacted in a certain  
6 way, but he didn't tell her about it. She didn't know about  
7 it. This is a self-contained interaction between this online  
8 community that never ends up involving her until the FBI gets  
9 involved and sort of takes this approach of explaining to her  
10 what happened.

11 And so what I believe the government would present  
12 is her reaction some months later with no context of who my  
13 client is, of how this interaction occurs online, of what kind  
14 of words her husband says, and so I think it has no relevance  
15 in relation to what we're actually dealing with in this  
16 offense.

17 And, you know, I certainly don't know exactly what  
18 they are going to have her testify to, but my suspicion is to  
19 have her come in and say how horrible it was when she read it  
20 and that's how she felt when she -- when the FBI came to her  
21 without context and provided this to her. I simply think that  
22 is not relevant at this point and is -- is prejudicial in the  
23 sense that this certainly was never going to get to her but for  
24 the FBI's approach of her and Mr. Lambert never --

25 THE COURT: Can I interrupt, Mr. Wolpin --

1 MR. WOLPIN: Yes.

2 THE COURT: -- and ask you about the child and  
3 family services portion of this?

4 MR. WOLPIN: Yes.

5 THE COURT: I don't know the facts of the case.

6 MR. WOLPIN: Yes.

7 THE COURT: And can you -- I imagine that there  
8 was -- what I'm understanding -- again, I don't have the  
9 materials in front of me. I'm proceeding on a recollection  
10 that may be imperfect.

11 I -- I thought there was some action actually taken  
12 by Cantwell to notify child and family services. And did that  
13 prompt some kind of interaction between child and family  
14 services and Cheddar Mane's spouse?

15 MR. WOLPIN: The answer to the first part is yes,  
16 there is a call that was made in June to CPS. That, according  
17 to what the government has told us, did not result in any  
18 interaction with the family. So she had no knowledge that that  
19 had occurred, as far as I can tell, at the time in June or July  
20 or August or September until the FBI comes and tells her the  
21 story of what happened.

22 So to my knowledge, no, she has no --

23 THE COURT: So the -- so, again, just -- let me just  
24 interrupt you and confirm my understanding that it is your view  
25 that the Cheddar Mane spouse had no awareness of this

1 communication until the FBI showed up at her door --

2 MR. LEVIN: The CPS -- the CPS report?

3 THE COURT: Any part of it. I -- not that the --

4 MR. LEVIN: So the -- the real --

5 THE COURT: Just let me -- just let me finish for a  
6 minute, please.

7 MR. LEVIN: Oh, sorry.

8 THE COURT: Yeah. Okay.

9 I -- I am understanding Mr. Wolpin to be saying to  
10 me that the Cheddar Mane spouse had absolutely no awareness of  
11 anything that was happening in communications from Mr. Cantwell  
12 to her husband about these alleged threats until the FBI showed  
13 up at her door and made her aware of them. And I just want to  
14 know if I'm understanding what I'm being told correctly,  
15 Mr. Wolpin. Am I --

16 MR. WOLPIN: Yes. So I have --

17 THE COURT: Now, Mr. Levin --

18 MR. LEVIN: Yeah. I just want to make a -- just to  
19 make a caveat to that, which is that the report we received  
20 said that she felt like, in quotes, someone may have mentioned  
21 the CPS threat to her, but she was not sure.

22 So that was the extent of whether or not she was  
23 aware that Cantwell had called Missouri Child Protective  
24 Services to make a report and that was a -- during a later  
25 interview. They asked her if she was aware, prior to speaking

1 with the FBI in October, that Cantwell had called CPS and she  
2 said she felt like someone may have mentioned it to her, but  
3 she was not sure.

4 THE COURT: And -- okay.

5 MR. WOLPIN: As far as the October interview, the  
6 language from the 302 is she was asked if she was aware of any  
7 online activity or any groups that Cheddar Mane may be a part  
8 of; she was aware of his beliefs, she was not aware of the  
9 content of his online activity or to what extent his beliefs  
10 are, she has not heard the names Chris Cantwell, Vic Mackey, or  
11 Cheddar Mane before, and she -- and it goes from there.

12 So --

13 THE COURT: Okay. All right. Thank you.

14 Let me ask the government to simply tell me, do you  
15 agree with what I am understanding, which is if the -- the  
16 Cheddar Mane's spouse were called as a witness to testify about  
17 the impact of this communication on her, her testimony would be  
18 essentially it had no impact on me until the FBI showed up and  
19 made me aware of it; is that right?

20 MS. KRASINSKI: I don't think so. I think she would  
21 say that she thinks her husband told her about a potential CPS  
22 call before the -- before the FBI showed up at her door.

23 I agree that she did not know about the words  
24 exchanged between Mr. Cantwell and her husband. She did not  
25 know about those.

1           Sort of the only other thing I would mention is that  
2     the photographs and the address -- I mean, the last time the  
3     FBI checked, those are still up and available in Telegram from  
4     when Cantwell posted them. So he may have posted them in June  
5     of 2019, but the impact to her is ongoing. That information is  
6     up, it is out, it is available, it is public. It remains  
7     public. So the --

8           THE COURT: I don't think -- excuse me, Counsel. I  
9     don't in any way mean to suggest that these kinds of  
10    communications are not painful for those that become aware of  
11    them when the -- when they're aimed at them and they become  
12    aware of them, whenever they become aware of them. Years  
13    later, it's painful. And I certainly understand to the extent  
14    you are telling me that these communications still exist in the  
15    online world and still have the capacity to injure Mr. -- or  
16    Cheddar Mane's spouse. I -- I'm not in any way trying to  
17    minimize that. I'm just not sure how that has a bearing on the  
18    element of a cyberstalking charge. And so that -- help me  
19    connect what you're saying --

20           MS. KRASINSKI: So I'm not talking --

21           THE COURT: -- to the extent you're telling -- I've  
22    got -- just let me finish.

23           To the extent that what you're telling me is, yeah,  
24    Judge, even if she never heard of it until the FBI showed up at  
25    her door, the fact that those are online now means that the



1 crime is ongoing and she can be able to testify about it even  
2 if she only found out about it last week. That -- that  
3 doesn't -- again, unfortunately, because of the circumstances  
4 in which this has been raised with me, I don't have any access  
5 to the actual documents to be able to study the problem. I'm  
6 trying to work as efficiently as I can, given the limited  
7 resources that I have available to me.

8 But am I understanding -- is that what your position  
9 is, that you need her -- you're going to have her testify that  
10 my husband may have made some reference to me, I'm not sure  
11 what, about a possible CPS call; but there will be no evidence  
12 that CPS ever contacted her, there will be no evidence that she  
13 knew about the communications in any kind of detail other than  
14 that prior to the time the FBI showed up at her door, and what  
15 she's going to be primarily testifying to is how it affected  
16 her when the FBI told her about what Mr. Cantwell had said.

17 Is that basically why you're calling her?

18 MS. KRASINSKI: No. And I want to be clear. There  
19 are sort of distinct categories of postings. There's the  
20 communications themselves, which I'm kind of separating out  
21 right now.

22 After the actual communication between Mr. Cantwell  
23 and Cheddar, Mr. Cantwell went on to the Radical Agenda chat  
24 group with over 200 members and in that group he publicly  
25 posted photographs of this woman and her children. He -- and

1 he posted essentially her address, everything but the number of  
2 her house. He posted the street, he posted the town, he posted  
3 the state.

4 And what Mr. Cantwell publicly posted, not -- not  
5 the communications, but this public posting, he put up in a --  
6 in a way that it -- it is still readily available.

7 And so for that, I think that's separate than the  
8 communications between Cantwell and her husband because this  
9 public posting of her, anyone could have called her about that,  
10 right? I mean, not just the FBI. Someone else could have  
11 said, hey, look, here you are with your kids in this -- in this  
12 Radical Agenda Telegram group with 290-something --

13 THE COURT: Let me stop you --

14 MS. KRASINSKI: -- listeners.

15 THE COURT: Let me stop you. Okay. Let me stop  
16 you.

17 Part of the reason that this is so unpleasant and  
18 frustrating for me is I don't have available my copy of the  
19 indictment, my copy of the statute, and so I am trying to parse  
20 a statute that I've never had to deal with in court before --  
21 that I have looked at, that I have done research on, that I  
22 prepared extensively to discuss with you at the last telephone  
23 conference where I had those materials available, but I don't  
24 have them available to me now. So I'm proceeding with very  
25 limited resources to try to analyze this problem.

1           My recollection is that the -- and, now, you -- you  
2 tell me what the elements of the cyberstalking charge are that  
3 you have brought as they apply to the -- Mr. Cantwell's spouse  
4 here. Is it the subjective reaction of the victim that's  
5 relevant? Is it what a reasonable person understanding the  
6 communication to be that is relevant? What is the -- what is  
7 the test here for the element that you're trying to get at by  
8 having her testify?

9           MS. KRASINSKI: So the jury instruction, based on  
10 Judge Laplante's instruction in *United States vs. Ackell*, is:  
11 In order for you to find that the defendant engaged in a course  
12 of conduct that would reasonably be expected to cause emotional  
13 distress, the United States must prove that the course of  
14 conduct would have caused substantial emotional distress to a  
15 reasonable person.

16           THE COURT: Yeah. So it's not the subjective -- you  
17 don't need to prove the subjective response of the spouse of  
18 Victim 1 to prove your charge, right? It's what a reasonable  
19 person would understand that the nature of the communication  
20 would be.

21           MS. KRASINSKI: That's one prong. Another method of  
22 proving it is that it actually caused substantial emotional  
23 distress to her --

24           THE COURT: That's what I'm asking. I had a  
25 recollection --

1 MS. KRASINSKI: I'm sorry.

2 THE COURT: -- that it was an unusual statute in  
3 that it could be proved by either it provoked a subjective  
4 response -- a response or it would reasonably be understood.  
5 And you're telling me --

6 MS. KRASINSKI: Yes.

7 THE COURT: -- you're going to -- your instruction  
8 proceeds under both of those prongs.

9 MS. KRASINSKI: Yes.

10 THE COURT: All right. Read me the proposed  
11 instruction that deals with the subjective part of it.

12 MS. KRASINSKI: So that is: In order for you to  
13 find the defendant guilty of the crime charged in Count Four,  
14 you must unanimously agree that the United States has proven  
15 one of the following beyond a reasonable doubt: That the  
16 defendant's course of conduct actually caused, attempted to  
17 cause -- although we -- we talked about that, that that may not  
18 be appropriate -- or would reasonably be expected to cause  
19 substantial emotional distress to either the victim or his  
20 spouse.

21 THE COURT: Okay. Now, is your -- is it your  
22 position that the crime could be committed even if the  
23 "actually caused" occurs as a result of the FBI making the  
24 victim aware of the threat after it occurs?

25 MS. KRASINSKI: So I think that --

1           THE COURT: Do you see the problem with that? It's  
2 almost like then the FBI can complete a crime that otherwise  
3 would never have been committed because they go to the victim,  
4 make the victim aware of it, the victim actually becomes -- has  
5 the emotional reaction that's necessary, and that is how the  
6 crime gets committed. That strikes me as a problematic way in  
7 which a defendant can be convicted of a crime.

8           In other words, if it doesn't meet the reasonable  
9 test but it meets the subjective test, but the subjective  
10 test -- the crime is satisfied only because the FBI goes and  
11 shows the victim the reaction and -- the communication and  
12 says, how do you react to that, that -- and that's what you're  
13 getting at here, you want to try to satisfy the subjective  
14 element by calling her to get her to say, when the FBI told me  
15 about this, I was extremely upset.

16           MS. KRASINSKI: So I don't think that we intend to  
17 discuss with her the contents of the communications between  
18 Cantwell and Cheddar directly, the -- if you don't want me to  
19 come and F your wife in front of your kids. And I think if it  
20 were only those communications -- I think if the course of  
21 conduct was limited to Cantwell saying things to her husband, I  
22 think that would be correct, that if she becomes aware of it by  
23 the FBI that her testimony probably wouldn't be relevant.

24           The difference is the posting of the public pictures  
25 and the actual calling CPS. Both of those actions, I would

1     argue, Cantwell engaged in with the purpose and expectation  
2     that she would be impacted by it. I think she would testify  
3     that, you know, she -- she -- she -- her husband may have  
4     mentioned the CPS thing and what she thought was, well, I don't  
5     think any investigation would result in my kids being taken  
6     away from me, but I certainly don't welcome the intrusion into  
7     my life. And I think the fact that Cantwell publicly posted  
8     pictures of her, that this is his action that are still  
9     available, I think the fact that he has publicly posted them in  
10    a way that still has the potential to impact her life that her  
11    testimony on those points is relevant because those relate  
12    directly to Cantwell's activity towards her.

13           THE COURT: Okay. A brief response from the  
14    defendant and then we'll wrap up on this particular issue.

15           MR. LEVIN: Your Honor --

16           THE COURT: Do you want to say anything else?

17           MR. LEVIN: I'm sorry. Just that materiality is not  
18    just relevance, it's super -- super relevance in the context of  
19    a Rule 15 deposition. We don't believe the testimony is even  
20    relevant. In fact, we filed a motion in limine on this point  
21    to prevent the testimony that's still outstanding. It's --

22           THE COURT: Could you -- could you read me the text  
23    of Rule 15, please, again? I'm not -- I'm acting without any  
24    ability to do the ordinary kind of legal research and analysis  
25    that I'm required to do generally. So please read me the text

1 of Rule 15.

2 MR. LEVIN: Okay. It says -- I'm sorry. I have to  
3 pull it up here.

4 A party may move -- this is when -- there's --  
5 there's multiple parts. There's when taken -- it says: A  
6 party may move that a prospective witness be deposed in order  
7 to preserve testimony for trial. The Court may grant the  
8 motion because of exceptional circumstances and any interest of  
9 justice. If the Court orders the deposition to be taken, it  
10 may also require the deponent to produce certain materials.

11 And then it says notice -- you have to have  
12 reasonable written notice of the date and location, the name  
13 and address of each deponent, and defendant's presence is  
14 required.

15 Then there's a --

16 THE COURT: What portion of the -- what portion of  
17 the rule leads you to the -- what you call a super materiality  
18 requirement?

19 MR. LEVIN: Well, it's in case law and we -- we  
20 cited various cases in our --

21 THE COURT: Yeah. So you understand I don't have  
22 the -- your objection, so now's your chance to make me aware of  
23 it. So tell me what the case law tells me -- tells me about  
24 super materiality.

25 MR. LEVIN: We cited a case called *United States vs.*

1     *Drogoul*, D-r-o-g-o-u-l, 1F.3d 1546. Testimony is material if  
2     it is highly relevant to a central issue in the case. The  
3     burden of proof rests with the movant to demonstrate the  
4     necessity for preserving prospective witnesses' testimony by a  
5     deposition. That's the *Ismaili* case, 828 F.2d 153, a Third  
6     Circuit case. It talks about -- *Ismaili* talks about testimony  
7     that negates the crux of the government's case as material, 828  
8     161.

9             And then *United States vs. Al Fawwaz*, which was a  
10     Southern District of New York case, a district court case from  
11     2014: It need not be definitive proof of guilt or innocence,  
12     but should be more than merely relevant.

13             Those are the -- those are the --

14             THE COURT: Okay.

15             MR. LEVIN: -- the cases.

16             THE COURT: I'm not sure where that -- I don't find  
17     it in the text of the rule that you've read to me anything that  
18     allows me to impose a -- a super relevancy requirement before  
19     allowing a deposition, but I do think the test for  
20     admissibility of evidence isn't restricted just to a Rule 401  
21     relevancy analysis and instead, ultimately, a Rule 403 analysis  
22     can -- a judge can consider a variety of factors, such as the  
23     cumulativeness or the burdensomeness of producing the evidence  
24     when deciding whether the evidence comes in.

25             I -- I -- I want to give the government one last



1 chance to respond because this is -- my initial reaction to all  
2 of this is, unfortunately, this is being brought to my  
3 attention very late in the game at a time where I have a  
4 limited capacity to conduct my own research of the -- of the  
5 problem and I do really need to give you an answer on an  
6 expedited basis.

7 But, second, based on what I've heard, it sounds  
8 like if this witness does not testify, it will impair your  
9 ability to prove your case in any significant way. The  
10 communications are what they are. Your arguments I think are  
11 powerful arguments about how a reasonable person would perceive  
12 these kinds of communications. And I -- you're free to make  
13 all of those arguments whether this particular person testifies  
14 or not. I understand there might be additional -- an emotional  
15 component to her testimony when she delivers it directly to the  
16 jury about how upsetting this is and I'm assuming -- I  
17 obviously don't know what she would say, but I'm assuming if  
18 you want to call her it's because she wants to tell the jury  
19 how upsetting it is to have learned about these communications.

20 But where she's learned about them because the FBI  
21 show up at her door long after the communications occur, I --  
22 it raises questions about whether that kind of testimony should  
23 even be allowed to determine the subjective component of the --  
24 of the crime and diminishes its usefulness when making  
25 arguments about the objective component.

1           Mr. Cantwell's going to testify. He can testify as  
2 to his reaction to the communications. The communications will  
3 be in front of the jury. The government will have full right  
4 to argue about how a reasonable person would perceive those  
5 communications.

6           I'm not sure -- given the extraordinary problems  
7 that doing what you're asking me to order the parties to do  
8 here would cause, I'm just not seeing how this extraordinary  
9 relief you're requesting at a very late stage in the proceeding  
10 can be justified.

11           So what do you want to tell me, Counsel, in response  
12 to what we've been discussing?

13           MS. KRASINSKI: So I think there are a couple  
14 important things. The first is that it's not learning about  
15 the communications between Cantwell and her husband that  
16 she's -- I mean, I think those certainly were upsetting to her,  
17 but I don't think that's the issue.

18           I think the issue is, for her, the fact -- the fact  
19 that Cantwell publicly, separate from his communications with  
20 Cheddar, the fact that he publicly posted her photographs and  
21 address in a way that is permanently and publicly accessible in  
22 this group that she does not want any part of, this Radical  
23 Agenda Telegram group that she doesn't want to be a member of,  
24 I think that is distinct from the private communications with  
25 Cantwell and her husband and there are -- there's not much case

1 law on that. The only cases that I could find even sort of  
2 remotely on point deal with essentially whether or not an  
3 indictment should be dismissed based on multiplicity and I -- I  
4 only found two cases that even sort of deal with this at all,  
5 both district court cases, one, *United States vs. Moreland*,  
6 M-o-r-e-l-a-n-d, 272 F.Supp. 3d 1222, and that's the Northern  
7 District of Oklahoma, 2016.

8 And in that case, that's kind of similar to what  
9 you're talking about, your Honor, where someone emails a victim  
10 hundreds of times and that was it and then the victim actually  
11 forwarded one of those emails to a family member. And what the  
12 Court in *Moreland* said was, well, look, the defendant didn't do  
13 that, so we agree that dismissal is appropriate here.

14 But separate and distinct from that there's a  
15 Southern District of Georgia case from 2019, and that's *United*  
16 *States vs. Oury*, O-u-r-y, 2019 Westlaw 8440692, that makes a  
17 distinction where the defendant engaged in conduct that is  
18 directly targeted at the -- at this third person, so where the  
19 defendant drove past the victim's parents' house, where the  
20 defendant engaged in conduct that was purposely directed at the  
21 victim's parents.

22 So here I think if it was just the communication  
23 between Cantwell and this -- and her husband, I think we'd be  
24 in a different boat and I don't think I -- I -- I think her  
25 testimony would not be that relevant. But where Cantwell took

1 separate steps apart from that in a -- and that Cantwell's  
2 actions have put her pictures and her address forever publicly  
3 available, it's his actions that caused the emotional distress  
4 on that part, not the communications on -- on his conduct of  
5 posting her photographs, her children, and her address  
6 publicly. And I think that's distinct.

7 THE COURT: Okay. I -- I think I fully understand.  
8 Again, she became aware of those public postings from the FBI  
9 making her aware of that; is that right?

10 MS. KRASINSKI: I think she did. I think she knew  
11 of a CPS call separate from, before the FBI, but I think she  
12 became aware of -- that Cantwell posted these pictures of her  
13 and that they continued to be available later.

14 THE COURT: And I -- I'm very reluctant to rule on  
15 this issue without undertaking the normal approach to resolving  
16 legal problems that come up that I follow in my work, but I'm  
17 feeling that we are facing some significant time pressure to  
18 get a ruling from me on this because we need to have this  
19 matter resolved in a way that does not delay the trial and that  
20 does not expose people who attend the trial to an undue risk of  
21 infection.

22 And I -- what the -- the government is proposing to  
23 me is either a practice that deviates from the agreed-upon  
24 quarantining and testing protocol which we have agreed upon in  
25 this case and which the Court has followed in the first case

1 that it tried and that we developed in consultation with the  
2 judges and a retained expert. And I'm very reluctant to  
3 deviate from that, that quarantining and testing protocol, and  
4 I'm not seeing how we can comply with that quarantining and  
5 testing protocol without delaying the trial if I'm to go with  
6 your proposal.

7 Do you have a solution that allows compliance with  
8 the quarantining and testing protocol that does not delay the  
9 trial?

10 MS. KRASINSKI: So I think if this occurs on the  
11 16th, it -- and one attorney traveled, it would allow the  
12 attorney that traveled, if they came back the day of, to  
13 quarantine and test.

14 I -- I -- I understand the -- I mean, it's --  
15 COVID-19 is the reason that we even filed this and so I  
16 certainly understand the Court's hesitation here.

17 The one thing I would ask is that, you know, I  
18 certainly understand that the Court is considering whether or  
19 not it wants to allow her testimony at all in determining  
20 whether or not to grant this motion. If the Court is concerned  
21 with the quarantine requirement, I -- you know, we wouldn't --

22 THE COURT: In truth, the least risky thing that she  
23 could do for herself would be to get in a car right now and --  
24 with her husband and drive to New Hampshire and stay in an  
25 Airbnb in New Hampshire until the trial's over. We have a

1 prevalence rate in this state that is vastly lower than it is  
2 in the state that she's currently residing at. She would have  
3 minimal exposure to the virus if she got in a car and drove.

4           It's unclear to me what the risks -- added risks are  
5 to an otherwise healthy young person in the first trimester of  
6 pregnancy anyway, but the procedure you're proposing exposes  
7 multiple additional people to added risk of coronavirus. And  
8 that isn't just you; it's the defense lawyer, it's  
9 Mr. Cantwell, I assume the jail will have to quarantine him for  
10 the entire time that the trial -- leading up to the trial, but  
11 he still is going to end up getting in a van with a driver  
12 every day back and forth to court and by releasing him in the  
13 custody of an FBI agent, they have to get on a plane and go out  
14 to the place where the victim's spouse is.

15           So it substantially changes the risk calculation  
16 that we are using when we decide that we can, with sufficient  
17 safety, conduct a trial. And, you know, that's, in part, why I  
18 talked to you multiple times about is everybody okay on the  
19 compliance with our quarantining and testing protocol, what  
20 contract do you have in place for testing of your witnesses, is  
21 the defense ready with having his witnesses testify -- tested.  
22 These are -- these are things that we tried really hard to make  
23 parties aware of, work with parties well in advance of the  
24 trials. They're not simple things to conduct. And this is  
25 extraordinary problematic.

1           So -- but I don't see how I can really wait much  
2 longer. I really am not inclined to delay the trial because  
3 I've already submitted a jury questionnaire to the panel  
4 advising them about the dates in which we'll be conducting  
5 the trial and it will -- it will potentially require  
6 disqualification of other jurors if we move the -- the date for  
7 taking of evidence in the trial. So I -- I don't consider  
8 continuing the trial to be, really, a viable option here.

9           MS. KRASINSKI: Then I would --

10          THE COURT: Go ahead.

11          MS. KRASINSKI: You know, I -- I understand all of  
12 the Court's concerns. You know, obviously we are trying to do  
13 this in a way that respects Mr. Cantwell's rights under Rule 15  
14 because it is ultimately up to him whether he would attend.  
15 But I would just ask if the Court is -- you know, doesn't want  
16 to grant the deposition in light of COVID-19 risk, I absolutely  
17 appreciate and understand that, but I would ask that before  
18 ruling on whether or not to exclude her testimony the Court  
19 allow the government time to work with her to see if either we  
20 would just not call her or if she would ultimately, over her  
21 physician's counsel, travel.

22               I don't know that we can make that call for her, but  
23 it would certainly be something we'd like to discuss with her  
24 if the Court is not inclined to grant the motion for  
25 deposition.

1           THE COURT: Yeah. I'm not ruling on admissibility  
2 of her testimony, but I am considering the -- not just whether  
3 the testimony meets the minimal threshold of relevance, which  
4 it -- it appears to do in certain respects, but whether given  
5 the risks that it poses to our ability to conduct a trial if  
6 I'm to accommodate the government in the way the government  
7 wants me to accommodate it with respect to authorizing the  
8 Rule 15 deposition, I -- I need to consider how that affects my  
9 ability to conduct the trial on the schedule that we've set, to  
10 conduct the trial safely.

11           And when the witness has information to provide that  
12 meets the minimal threshold of relevancy but isn't essential to  
13 the government's ability to prove its case, that can -- it  
14 seems to me -- again, I, unfortunately, I have not had a chance  
15 to study the case law on this, but it seems to be entirely  
16 appropriate to consider those kinds of impacts when evaluating  
17 a request to allow a deposition. So how important the  
18 witness's testimony is should be a consideration in determining  
19 whether to grant the motion. So I'm -- I'm evaluating it for  
20 that reason, not to determine whether it meets the minimal  
21 threshold of relevancy or whether it should be excluded under  
22 403 as a waste of time.

23           If she were -- if she were in New Hampshire, able to  
24 comply with our quarantine protocols and you wanted to call her  
25 as a witness, that would be a simple Rule 401, Rule 403



1 calculation. I've already suggested it appears to easily  
2 satisfy the Rule 401 standard.

3           The Rule 403 criteria are completely different, but  
4 I don't have to worry about, well, if I call her, it's going to  
5 delay the trial; if I call her, she's going to increase the  
6 risk that I'll have to stop the trial because one or more  
7 people will become infected with COVID during the trial because  
8 she hasn't complied with the quarantine procedures that we've  
9 agreed on or that other people who have traveled out to take  
10 her deposition are no longer complying with the quarantine  
11 procedures that we agreed upon.

12           So that's why I'm considering it. So I -- don't  
13 worry. I'm not saying she can't testify at all. The defense  
14 certainly has a right to try to move to bar her testimony.  
15 There's a motion in limine apparently that's been filed to that  
16 effect. But I -- I don't have to rule on that until you try to  
17 call her as a witness, so ...

18           All right. Well, I -- I understand. I think I  
19 understand both parties' arguments here. And I just want to be  
20 very clear at the outset here, and I hope you accept this as  
21 being a statement by me made in utmost good faith. I would  
22 never rule against a party on any issue because I'm  
23 dissatisfied with the way in which the party raised the issue  
24 with me.

25           So, Ms. Krasinski, I'm frustrated that I didn't have

1 this in front of me at a time when I could analyze it in a way  
2 that I ordinarily analyze problems, but that has nothing to do  
3 with whether I grant or deny the motion. It's not -- I'm not  
4 ruling on this matter as a matter of personal pique, you know,  
5 that I have some kind of anger and I'm just ruling to punish  
6 someone. That has nothing to do with my analysis of the issue.

7 But I am going to deny the government's motion, and  
8 let me explain my reasons. And I've alluded to them during the  
9 course of our discussion here.

10 First, it is important to me that this request is  
11 being made at a very late date in the trial process, after the  
12 last scheduled telephone conference with the parties that I  
13 arranged to discuss issues of this sort with the parties prior  
14 to my leaving the court for a few days to be away from the  
15 court for the first time in about 15 or 16 months. And I -- I  
16 am now hearing this matter at a time when I'm away from the  
17 court, when I have very limited Internet access, very limited  
18 telephonic access, no ability to have in front of me the case  
19 law that the parties are citing to me, no ability to analyze  
20 the statutes and the rules that we've been discussing except in  
21 the way that I'm trying to do it here.

22 And that is important to me, that this request is  
23 coming to me at a late date. A later than -- it could have  
24 raised with me -- it could have been raised with me at a time  
25 when I would have had a greater opportunity to act. So that's

1 important to me in my analysis, not because I'm frustrated with  
2 the government's conduct, but because it has an effect on my  
3 ability to analyze the issue the way I want to analyze it and  
4 it could have been raised with me at an earlier period of time.

5 More fundamentally here, the motion places me in a  
6 very difficult position. We have tried to give the government  
7 and defendant the right to have a trial, a speedy trial, in an  
8 environment in which the people coming into the courthouse are  
9 placed at risk of infection with the -- with the coronavirus  
10 and we have very carefully, in consultation with an expert,  
11 developed protocols that are designed to satisfy the government  
12 and the defendant's interest in a speedy trial while minimizing  
13 the risk to members of the public that we bring into the  
14 courthouse against their will to serve on juries and to be  
15 testifying as witnesses. And we developed those protocols very  
16 carefully to make sure that we can conduct this trial as safely  
17 as possible.

18 The government -- the government's proposal requires  
19 me to deviate from those protocols that have been carefully  
20 developed or it requires me to continue the trial. Continuing  
21 the trial is problematic because I've already sent a  
22 questionnaire to the jurors informing them of when we would be  
23 holding the trial and it will complicate our ability to conduct  
24 the trial if I am to delay it beyond the dates that we agreed  
25 to several weeks ago. And so the -- I'm placed in a position

1 where either I have to compromise our -- our safety protocols  
2 or I have to delay the trial. Neither of those options is a  
3 good one.

4 And so to justify doing what the government wants  
5 really requires a very strong reason why I should increase the  
6 risk to the public by not complying with our quarantining  
7 procedures or complicate our ability to try the case by  
8 delaying the trial. And here I just don't see there is a  
9 sufficient justification offered by the government for the  
10 extraordinarily -- extraordinary relief it is requesting.

11 I have tried to listen carefully to the government's  
12 proffer as to what the witness would testify to. I agree that  
13 she has relevant testimony to provide, but that testimony does  
14 not strike me as in any way essential to the government's  
15 ability to prove its case and, indeed, it seems to be of much  
16 lesser relevance than other evidence that the government will  
17 rely on, such as testimony from Cheddar Mane. Almost every  
18 argument that the government wants to present that I'm aware of  
19 can be fully presented to the jury whether this witness  
20 testifies or not.

21 And so -- and then, finally, I would note that it is  
22 by no means apparent to me that requiring this witness to  
23 travel by automobile to New Hampshire places her at any greater  
24 risk than she would face staying home where she is. On the  
25 other hand, requiring a large group of people, including an

1 incarcerated defendant, to travel to her increases the risk  
2 significantly that others will become infected.

3 And so I'm not satisfied that from a pure risk  
4 reduction standpoint that the government's proposal is a  
5 superior proposal to what seems to me to be another available  
6 alternative, that is for her to safely travel to New Hampshire  
7 by automobile and to remain here in a state which has one of  
8 the lower prevalence rates in the United States for a  
9 sufficient time to comply with our quarantine and testing  
10 protocol.

11 And so for all of those reasons, I don't believe  
12 on balance that the government has prevailed and I deny for  
13 that reason -- and, of course, I do so without prejudice to the  
14 government's right to seek to call the witness if she is  
15 willing to come to New Hampshire and testify.

16 Is there -- anyone else need me to say anything else  
17 about that particular issue? There's one more issue on the  
18 table I need to talk to you about, but does anyone want to say  
19 anything more about that particular issue?

20 MS. KRASINSKI: No, your Honor.

21 THE COURT: Anything from the defense?

22 MR. LEVIN: No, your Honor.

23 THE COURT: All right. So that -- that motion is  
24 denied.

25 Now, there's another problem with another witness

1 the government has filed and that appears to be a witness who  
2 is not communicating with the government, according to the  
3 government, because she's been told not to communicate with the  
4 government by the defendant.

5 Is that -- is it that the -- is that --  
6 Ms. Krasinski, is that what the problem is?

7 MS. KRASINSKI: So my only concern is whether or not  
8 I can tell the Court whether or not she's complied with  
9 quarantine requirements. And, actually, this morning she  
10 called and said that she had seen a copy of our notice and has  
11 a call I think scheduled with our victim/witness coordinator  
12 this afternoon, so I'm hopeful that we'll be able to resolve  
13 that issue.

14 THE COURT: All right. Well --

15 MR. LEVIN: We received correspondence from her  
16 indicating that she's been trying to reach both the court the  
17 U.S. Attorney's Office.

18 THE COURT: I don't know what she -- I've not been  
19 made aware of any efforts on her part to communicate with the  
20 court.

21 I'd ask my case manager: Are you aware that this  
22 person has been trying to communicate with the court?

23 THE CLERK: She called me today, your Honor.

24 THE COURT: Oh, she did. Okay. Can you tell me  
25 what -- as best you can, what was the nature of the

1 communication you had with her?

2 THE CLERK: She called and said she was trying to  
3 get in touch with the victim/witness coordinator at the U.S.  
4 Attorney's Office and that she did not -- that he had been  
5 trying for several days and was unable to do so.

6 THE COURT: Okay.

7 THE CLERK: I gave her the phone number and email  
8 address.

9 THE COURT: All right. So, Ms. Krasinski, you think  
10 that she is going to talk to the coordinator this afternoon?

11 MS. KRASINSKI: I think they spoke briefly this  
12 morning and that they are going to -- they scheduled a call for  
13 this afternoon and I'm hopeful that that occurred. The last  
14 time they had something scheduled, she sent an email saying  
15 that she wasn't going to communicate with us.

16 So I'm -- I'm hopeful that we can all get on the  
17 same page just about being able to discuss with her whether or  
18 not she is complying with the court's quarantine requirement.  
19 But that's it. You know, she has an absolute right not to  
20 speak to us or meet with us before trial and I don't have any  
21 issue with that. My concern is simply making sure I can  
22 represent to the Court that she's complied with those  
23 quarantine requirements. I'm hopeful now that we'll be able to  
24 do that.

25 THE COURT: Do you have her under subpoena?

1 MS. KRASINSKI: Yes.

2 THE COURT: All right. Because I am going to want  
3 to ensure that our witnesses have complied with the quarantine  
4 requirements. If after this communication you have doubt about  
5 whether she is willing to do that, it would seem to me the next  
6 step would be for you to seek a warrant for her detention as a  
7 material witness and then we can hold her in quarantine for the  
8 required period so that she can testify safely.

9 I -- those are not measures that I would resort to  
10 lightly, but I want this trial to be conducted and it's going  
11 to be conducted in a way that's safe. And it -- it -- I don't  
12 know what -- if you've given any thought to that, but one thing  
13 to do is subpoena her for the first day of trial, subpoena her  
14 to come here for jury selection, and require her to remain here  
15 until the -- we're ready to have her testify.

16 Another -- another way to do that would be to seek a  
17 warrant for her arrest as a material witness and we could -- I  
18 would consider whether I need to have her detained until she  
19 can testify. We're not going to fool around with this. People  
20 are going to comply with whatever orders or you can ask me to  
21 issue an order ordering her to do it under pains of contempt if  
22 she does not.

23 So there are -- those at least are three options  
24 that strike me as available options to the Court. I would like  
25 your -- your thoughts and the defense's thoughts about that.



1 MS. KRASINSKI: I -- I would -- I would like to wait  
2 and see what happens with this call with the victim/witness  
3 coordinator this afternoon. You know, seeking a warrant for  
4 her would be my absolute last resort. I would hate to have to  
5 do that. So I'm hopeful that this issue can be resolved now,  
6 but if not, we'll alert the Court.

7 THE COURT: All right. And defense response?

8 MR. WOLPIN: Yeah, I don't think there is an issue.  
9 I mean, she emailed -- she cc'd us on the email as well  
10 explaining her understanding of the quarantine and how many  
11 days she would have to be quarantined, that she'd been trying  
12 to leave messages with the government, that she'd called the  
13 court leaving messages, and she would need a plane ticket.

14 So I don't think we have a foundation at this point  
15 that she's noncompliant or noncooperative. And as -- you know,  
16 I'd just like to address they noted in their motion I did  
17 advise her to -- the only advice I thought I could give her --  
18 which was to contact the party who subpoenaed you for those  
19 arrangements.

20 I had, at the government's request, reached out to  
21 her again to see if she was represented by counsel so there was  
22 someone who could advise her if it was heading toward the  
23 direction of do I have to comply or not have to comply with  
24 court orders. I felt that was beyond what I could get into  
25 with her.

1           So we've made the effort and then she indicated this  
2 morning that she was making the effort as well. So I think  
3 it's little premature to suggest that she's sort of drawing a  
4 line in the sand or saying she's not going to cooperate with  
5 them as far as quarantine requirements.

6           MS. KRASINSKI: And I just want to be clear. My  
7 understanding of the quarantine requirement is a five-day  
8 quarantine and test if she were to drive. If she flies on a  
9 commercial flight, I think that requires a 14-day quarantine  
10 period.

11           Do I have that -- am I understanding that correctly,  
12 or if she flies a commercial flight that she --

13           THE COURT: I don't have access to the specific  
14 protocol. You can contact the chief deputy clerk. She's  
15 extraordinarily knowledgeable about these matters. Any  
16 questions you have about the quarantining protocol she can  
17 answer.

18           I just want the parties to understand I'm serious  
19 about this. Okay? We're conducting this trial, we're  
20 conducting it on time, we're conducting it in as safe a way as  
21 we can, consistent with the carefully developed procedures that  
22 we are implementing for these trials, and I expect the parties  
23 to ensure that there has been compliance.

24           And if someone is -- has been -- if the parties are  
25 unable to assure the Court that there has been compliance, the

1 parties should notify me and my -- my case manager should track  
2 me down immediately if there is any kind of filing to that  
3 effect and we will consider what these options are. And  
4 certainly one option is to give a person who doesn't want to  
5 comply with the protocols the opportunity to challenge them.  
6 And I'm happy to appoint counsel and give that person an  
7 opportunity to challenge.

8           What I'm not prepared to do is have these issues be  
9 unresolved heading into the trial. And if people are not  
10 responding, which is what I was presented with in the filing --  
11 just not that they've been trying to contact people but that  
12 they weren't going to talk to the government. That's the  
13 impression I was given in the filing that was made to me --  
14 I -- we're not going to fool around with that. Okay? People  
15 need to comply or they need to tell the Court, I don't think I  
16 should have to comply. And if they don't think they have to  
17 comply, I can appoint counsel for them and they can come in and  
18 we can address this in a -- in the ordinary fashion.

19           But if they are not willing to communicate with the  
20 Court, then we may have to resort to the use of judicial power  
21 to compel them. And I am willing to use that power as  
22 necessary, but I -- I don't do it lightly and I certainly  
23 wouldn't do it if someone is trying to comply or trying to  
24 determine what their obligations are.

25           And so I -- it sounds like the situation has

1 developed from the time the government filed its initial motion  
2 with me, but if that should change, you need to let me know  
3 right away because I need to get some means of communicating  
4 with that person, I need to perhaps issue orders, I need to  
5 perhaps issue warrants, I need to perhaps appoint counsel.  
6 There are a variety of things I may need to do.

7           So let's hope that you're successful in resolving  
8 this matter in the way it should be resolved, but if you are  
9 not, let my case manager know immediately. My case manager  
10 will let me know immediately and we will get another telephone  
11 conference and figure out what to do. But it's not going to be  
12 an option to just sort of let things go until the time of  
13 trial. Okay?

14           Anything --

15           MS. KRASINSKI: Your Honor, can I --

16           THE COURT: Anyone want to say anything else about  
17 this particular issue? Yes, go ahead.

18           MS. KRASINSKI: I just want to make sure the record  
19 is clear on this, and it doesn't impact anything since she has  
20 contacted us today.

21           I know she has said in an email that she has been  
22 attempting to contact us. We have no record of even an attempt  
23 at contact since September 4th. So I know she had said that.  
24 I just want to make sure the record's clear on that because the  
25 victim/witness coordinator, you know, works very hard to

1 respond to people when they call. So I just want to make sure  
2 that's clear. It's of no matter since she has contacted our  
3 office today.

4 So the only other issue that I want to raise with  
5 the Court is something that just happened last night. I have a  
6 family emergency that just happened. I would like to travel to  
7 New York for it. I would drive in a personal vehicle, I would  
8 go and then I would come back. I would quarantine for five  
9 days and test. I understand that it would mean I would miss  
10 jury selection, but --

11 THE COURT: Well --

12 MS. KRASINSKI: -- assuming a negative test, I  
13 should --

14 THE COURT: Yeah. Well, let me just stop you. So  
15 I'm sorry that you have your emergency. We want to try to  
16 accommodate you if we can.

17 Are you -- and I don't need to know the details of  
18 the emergency, but New York has -- it depends on where you are  
19 in New York, but New York is among the lowest prevalent state  
20 in the country right now with a positivity rate -- test  
21 positivity rate of below 1. I was in New York for a couple  
22 hours ten -- about eight or nine days ago. I don't have any  
23 problem with you traveling to New York and, frankly, I don't --  
24 I'm not even concerned about a need to quarantine as long as  
25 while you were there you were maintaining social distancing,

1 meeting with people outdoors, not being in rooms with people  
2 that you -- whose COVID status you don't know.

3 Are you going to be able to do that or are you going  
4 to have to be physically present indoors for extended periods  
5 of time with people who -- with whom you are not currently  
6 exposing yourself to on a regular basis?

7 MS. KRASINSKI: I would need to be indoors with  
8 someone who has been homebound for, you know, about a year, so  
9 who has been essentially socially isolating this whole time.  
10 You know, she has no indications of COVID-19 and hasn't been in  
11 contact with anyone because she's homebound.

12 THE COURT: Yeah.

13 MS. KRASINSKI: It would be driving there, seeing  
14 her, driving back. I would be masked the whole time. I could  
15 certainly ask the one other family member who would be present  
16 to wear a mask. I don't even need to stay for an extended  
17 period of time.

18 THE COURT: It -- is it New York City or where in  
19 New York is it?

20 MS. KRASINSKI: Westchester County, New Rochelle.

21 THE COURT: Okay. Yeah. So, again, there were  
22 times when -- that New Rochelle had a very high prevalence  
23 rate. It doesn't now. And I -- I mean, I -- of course, attend  
24 to the emergency. That -- it's good that we have two lawyers  
25 on the case and we'll do whatever we need to do. And if you

1 need to be absent for jury selection, that's fine with me. You  
2 can show up halfway through the trial, as far as I'm concerned.  
3 Mr. Davis is a very able prosecutor and more than able to  
4 handle whatever he needs to handle in your absence.

5           So, again, I'm really sorry that you face this  
6 problem and of course you should attend to it and you should  
7 keep in communication with the court. But this is a -- a  
8 relatively low risk event that I'm confident you can attend to  
9 and with -- usually -- the information I have is that 80 or  
10 90 percent of cases in which symptoms develop, they develop  
11 within five days of exposure. The 14-day period is an out --  
12 outside limit on transmissibility. Transmissibility really  
13 tends to occur relatively early on in the -- after exposure and  
14 we are quite confident that in those cases, a five-day  
15 quarantine and a negative test is -- leaves you at  
16 substantially reduced risk of transmitting the disease.

17           So I know you'll be careful. I know you'll follow  
18 as many of the social distancing and mask wearing and proper  
19 ventilation guidelines as you can. And when you come back, you  
20 can test -- you can quarantine for five days and take a  
21 negative test and you should be good to go.

22           So you might miss the jury selection, but you should  
23 be fine for the trial, right?

24           MS. KRASINSKI: Right.

25           THE COURT: Yeah. Okay. So -- and, Mr. Davis, are

1 you on the line?

2 MR. DAVIS: Yes, I am, Judge, and that's fine.

3 THE COURT: You can handle the jury selection,  
4 right? You've done probably a hundred trials. You can do --  
5 you can do this without Ms. Krasinski's able assistance.

6 All right. So that's fine.

7 MR. DAVIS: She will be greatly missed, your Honor,  
8 but yes.

9 MS. KRASINSKI: I have faith in Attorney Davis.

10 THE COURT: Okay. So I appreciate knowing that and  
11 obviously let me know if there's anything that -- that happens.

12 All right. So what else -- I really would like to  
13 try not to spend -- I'd like to have a few days where I am not  
14 focusing on court business, if it's at all possible. So while  
15 you have me on the line now, is there anything else that you  
16 think I need to be talking to you about before the jury  
17 selection on Tuesday?

18 Anything from the government?

19 MR. DAVIS: No.

20 MS. KRASINSKI: No, your Honor.

21 THE COURT: Anything from the defense?

22 MR. WOLPIN: No.

23 MR. LEVIN: No, your Honor.

24 THE COURT: Okay. All right. So I -- I'll tell my  
25 case manager, while I've got you on the line, you and Jen and,



1 if necessary, you can ask my law clerk, Samira, anything that  
2 these people file, as soon as it comes in, if you think that  
3 it's something that could affect the schedule of the trial,  
4 then by every means available, text me, try to call me, email  
5 me, with an emergency notice. And I will try to check at least  
6 once a day to see whether there's anything like that being  
7 filed and we will get people on the phone and I will resolve  
8 these issues. And -- and, you know, I -- I really do want to  
9 try to move ahead.

10 While we are on the phone, let me address one issue  
11 that you're not raising with me right now, but that I -- I  
12 wanted to raise with you and that is with respect to the  
13 confidential informant.

14 I questioned the confidential informant and a  
15 transcript is going to be prepared of that conversation. As  
16 far as I can see, there's nothing in that conversation that  
17 cannot be released to the defendant.

18 Does the government have a view about that?

19 MR. LEVIN: We received it already, your Honor.

20 THE COURT: Okay. Good. Good. Okay. So you --  
21 you know what that communication is. Now, there's one thing  
22 there that I wanted to draw to your attention and that is as  
23 far as I could see, the one thing that that witness might have  
24 that was useful to me, there may be other things that are  
25 useful to you, but he did have -- he did recall another person

1 who he had a communication with that had a -- again, I don't  
2 have the transcript in front of me -- personal familiarity with  
3 Cheddar Mane and the use of drugs and I instructed the witness  
4 to give that name to the FBI agent.

5 Has -- do you intend to do anything with respect to  
6 that information which all of what I've just described and  
7 anything I know about it is reflected in that transcript,  
8 Mr. Levin?

9 MR. LEVIN: Well, information that we haven't  
10 received yet, but we're -- I guess we'll have to discuss that.  
11 I think given the time line now, it's unlikely that we're going  
12 to be able to do anything with it, but --

13 THE COURT: Well, my -- my strong sense, Mr. Levin,  
14 is that because you have available to the -- the chat in the  
15 invitation-only group that you have everything that I could  
16 nail down that this witness had that bears on Cheddar Mane's  
17 use of drugs. And, therefore, it does not seem to me that  
18 under *Roviaro* and the controlling First Circuit precedent that  
19 I've previously cited and, unfortunately, again, I don't have  
20 it in front of me now, that it seems to me that there -- that I  
21 should not order the disclosure of the confidential informant's  
22 identity.

23 If you have any different -- any additional -- I  
24 mean, you're preserving your argument for purposes of appeal,  
25 but having received the transcript and having reviewed the

1 transcript, do you have any additional arguments to present to  
2 me on that point? Because my inclination is he doesn't know  
3 anything that would be potentially useful by way of extrinsic  
4 evidence about Cheddar Mane's use of drugs that you don't  
5 already have available to you. Do you have a different view on  
6 that, having looked over the transcript?

7 MR. LEVIN: No, we do not, your Honor.

8 THE COURT: Okay. All right. So you've preserved  
9 your argument for purposes of an appeal.

10 I'll ask my case manager to remind me when I get  
11 back to memorialize this and explain it further on the record  
12 either on the day of jury selection or at some other point  
13 during the trial because I don't have the case law in front of  
14 me now and I don't want to make a fully explained ruling.

15 But so that the parties know for purposes of their  
16 preparation, it's my judgment after questioning the witness  
17 under oath that the witness does not have any information about  
18 Cheddar Mane's use of drugs that would be useful to the  
19 government by way of extrinsic evidence to show Cheddar Mane's  
20 bias that -- that which the defendant already has available to  
21 it because they have access to the records of the  
22 communications in the Telegram group which was the principal  
23 source of the informant's knowledge about drug use by Cheddar  
24 Mane. And, therefore, under the existing precedent, the  
25 disclosure of the informant's identity should not be required

1 and I do not intend to order it to be produced.

2 And I'll provide a -- a more detailed oral ruling on  
3 that during the course of the trial and I'll just ask my case  
4 manager to remind me of that when the time comes.

5 Okay. Is there anything else anyone wants to say to  
6 me on any other subject?

7 MR. LEVIN: No, your Honor. Enjoy your vacation.

8 THE COURT: Thanks. What's left it, because I've  
9 given up the -- all day Tuesday and Wednesday of it for the  
10 trial. So I've got a couple days anyways, but I thank you. I  
11 appreciate that.

12 And, Ms. Krasinski, I really do hope things turn out  
13 well for you and I fully understand the -- the need that you  
14 have to do what you need to do and you should do it. And,  
15 fortunately, we have Mr. Davis here and whatever happens, I'm  
16 completely comfortable even if necessary he could do the whole  
17 trial by himself. So do what you need to do and we'll work  
18 around that. All right?

19 Thank you. That -- that concludes our -- that  
20 concludes our hearing and I'll see everybody on Tuesday.

21 MR. LEVIN: Thank you, your Honor.

22 (Proceedings concluded at 3:54 p.m.)  
23  
24  
25

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that  
the foregoing transcript is a true and accurate transcription  
of the within proceedings, to the best of my knowledge, skill,  
ability and belief.

Submitted: 5/12/21

/s/ Liza W. Dubois  
LIZA W. DUBOIS, RMR, CRR